United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1157

In The

United States Court of Appeals

For the Second Circuit

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES LORD, GERALD J. YAGY, and GERHARDT J. SCHWARTZ,

Defendants-Appellants.

P/S

Appeal from Orders and Judgment of Conviction in the United States District Court for the Western District of New York

BRIEF FOR APPELLEE

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Issues Presented

I. Whether the trial court erred in denying defendants' motion for severance.

II. Whether the trial court erred in failing to suppress Schwartz's confession.

III. Whether the destruction of F.B.I. notes following the preparation of a formal 302 summary denied the defendants due process.

IV. Whether the sentence of each defendant was a proper exercise of judicial discretion.

V. Whether the trial court erred in sentencing Yagy to consecutive terms for conspiracy and aiding and abetting.

VI. Whether defendant Yagy was denied his right to a speedy trial.

VII. Whether the trial court erred in refusing to *voir dire* the jury with respect to prejudicial publicity and possible misconduct.

VIII. Whether any substantial prejudice resulted from references to the stabbing incident.

IX. Whether the trial court made a proper preliminary finding as to the existence of a conspiracy to admit hearsay statements.

X. Whether evidence of Yagy's gambling partnership with Hook was relevant and admissible evidence.

XI. Whether the evidence was sufficient to sustain the jury's finding that Yagy was guilty.

XII. Whether the trial court's charge on the issue of identification was proper.

XIII. Whether the admission into evidence of false exculpatory statements of Lord was appropriate.

XIV. Whether the record demonstrates that the defendants were given a fair trial.

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BRIEF FOR APPELLEE

Counterstatement of the Case

On February 12, 1977, James R. Lord, Jr., Gerald J. Yagy, and Gerhardt J. Schwartz were convicted of Bank Robbery and Conspiracy. In addition, James R. Lord, Jr., and Gerhardt J. Schwartz were convicted of Armed Bank Robbery. At the close of the Government's proof, the charge of Armed Bank Robbery against Gerald J. Yagy was dismissed by the trial court, John T. Elfvin, United States District Judge, presiding.

The jury was selected in this case on February 8, 1977. Seventeen witnesses testified during the hearings and trial. On February 12, 1977 the jury returned its verdict of guilty against each of the defendants.

On March 18, 1977, Gerhardt Schwartz was sentenced to twenty-five years imprisonment on the bank robbery counts and to five years on the conspiracy, to run consecutively.

On March 22, 1977, Gerald J. Yagy was sentenced to ten years imprisonment on the bank robbery count and to five years on the conspiracy, to run consecutively.

On March 22, 1977, James R. Lord, Jr. was sentenced to twenty years imprisonment on the bank robbery counts and to five years on the conspiracy, to run consecutively.

Counterstatement of Facts

On April 9, 1976 two men robbed the Columbia Banking Savings and Loan Association in Rochester, New York. One man was armed with a handgun, and the other carried a double-barrelled, sawed-off shotgun. During the robbery numerous threats of violence were made and weapons were pointed at various customers and employees. The two robbers left with the money totalling approximately $43,365.00.

During the course of the robbery bank surveillance cameras were activated and photographs of each robber were taken. A total of nine photographs were admitted into evidence (TT. 366)*, five depicting the robber with the handgun and four depicting the robber with the sawed-off shotgun. Each robber was wearing green overalls and a stocking mask throughout the bank robbery.

However, the physical appearance of James Lord, Jr. in the courtroom resembled the robber carrying the handgun in the photographs (TT. 836-837; G. App. 521-522). In addition, his

*"TT." refers to the trial transcript; "VT." refers to the *voir dire* transcript; "G. App." refers to the Government's Appendix; "D.App." refers to the Joint Appendix of the Defendant-appellants; "Yagy:" refers to Appellant Yagy's brief; "Lord:" refers to Appellant Lord's brief; "Schwartz:" refers to Appellant Schwartz's brief. The numbers appearing after these references refer to the pages of these papers.

appearance matched the descriptions given by the bank employees and customers. (TT. 303-305; 361-362). Furthermore, Ronald Hook, the co-conspirator, testified that James Lord was the individual carrying the handgun. (TT. 466; G. App. 233).

The physical appearance of Gerhardt Schwartz in the courtroom resembled the robber carrying the shotgun in the photographs. (TT. 836-837; G. App. 521-522). In addition, his appearance matched the descriptions given by the bank employees and customers. (TT. 303-305, 361-362). Furthermore, Ronald Hook, the co-conspirator, testified that Gerhardt Schwartz was the individual carrying the shotgun. (TT. 466; G. App. 233). Moreover, in his confession, Schwartz admits he was the one carrying the shotgun. (G. App. 6).

According to the evidence, Yagy enlisted Ronald Hook to drive a getaway car for Lord and Schwartz during the bank robbery. The evidence clearly showed that Yagy was a principal in the bank robbery scheme and did receive substantial money from the robbery. (TT. 473-475; G. App. 240-42). Lord and Schwartz actually entered the bank and escaped with Ronald Hook driving the car. All these parties received some portion of the bank robbery proceeds.

Ronald Hook, the unindicted co-conspirator, was the Government's principal witness. His trial testimony is lengthy. (G. App. 174-433). He thoroughly identifies each of the defendants as perpetrators of and participants in the Columbia Bank Robbery. (TT. 447, 457; G. App. 214, 224).

In essence, Hook identified Yagy as a forty-two year old man who operated a pizzeria where Hook worked. At the time of the robbery, Ronald Hook was a seventeen year old boy. During this testimony, Hook identified Yagy as the man who had corrupted him by taking him to various social clubs and gambling halls in Rochester, New York. Having formed a gambling partnership, the two had accumulated a $900.00 debt by April, 1976. (TT. 421-426, 444; G. App. 188-93, 211). Yagy

suggested that Hook drive getaway car in a bank robbery which would yield the money to pay off their debt and get him some extra money. (TT. 446; G. App. 213).

Yagy encouraged Hook by telling him that "they" had inside information; how much money would be there, and how many police cars were going to be there. Yagy also said, "You will only be driving for approximately eight to ten seconds until you get into another car." (TT. 446; G. App. 213).

Thereafter, Yagy introduced Hook to James R. Lord, Jr. (who was using the name of Jimmy O'Brien) and they discussed the proposed bank robbery. Lord and Yagy then took Hook over the route of the robbery, emphasizing that it would be easy and there was no danger. (TT. 447-49, 452-53; G. App. 214-16, 219-20). At this time, Lord said that "they" had planned the robbery for the previous week, but that it was postponed because of a supermarket robbery in the area of the bank. (TT. 450-51; G. App. 217-18). Mr. Yagy was present during this conversation.

On the next evening, Yagy and Hook had a conversation concerning the bank robbery to take place the next day. (TT. 456-57; G. App. 223-24).

Following their prearranged plan, Yagy picked up Hook on April 9, 1976 at 7:30 a.m. After driving to a local restaurant, Yagy led Hook inside to Lord and Schwartz. (TT. 457; G. App. 224). Lord and Schwartz thereafter talked to Hook about the robbery. (TT. 463; G. App. 230). Lord, Schwartz and Hook then left the restaurant and drove around until 9:00 a.m., when they arrived at the bank plaza. On the way to the bank they switched cars and changed their clothing. (TT. 463-467; G. App. 230-34). Hook saw Schwartz put several shells into a sawed-off shotgun. Schwartz (armed with the shotgun) and Lord (armed with a pistol) went into the bank wearing overalls, carrying weapons and pillowcases and disguised by having

stockings over their heads. (TT. 466; G. App. 233). The robbery and the escape proceeded as planned and, after disposing of the clothing, the three went to the Americana Hotel to divide the money four ways. (TT. 466-471; G. App. 233-38).

Hook left the hotel without the money and went to Yagy's house on Britton Road in Rochester. He saw Yagy who was angry with him because he had not brought the money with him. (TT. 470-72; G. App. 237-39). After about a two-hour wait, Lord and Schwartz arrived at Yagy's house. (TT. 473; G. App. 240). Lord gave his pistol to Yagy. (TT. 474; G. App. 241). After giving Yagy and Hook their share of the money, Lord and Schwartz left the house. Yagy, in addition to his share, took $4,000.00 from Hook's share "for me setting you up with these people". (TT. 475; G. App. 242).

During the afternoon of April 9, 1977, the day of the robbery, Lord was interviewed by the FBI. As the FBI arrived, Rochester Police detectives were concluding an interview with Lord and left his apartment. (TT. 377-386; G. App. 164-73). During the course of that FBI interview, Lord was asked about his whereabouts that morning. Lord said that between the hours of 8:30 and 10:30 he was with his mother at St. Mary's Hospital, Rochester, New York. This was later shown to be a false exculpatory statement. Later during the interview, James Lord called his mother at her hospital room and said:

> "Mommy, this is Jimmy. Do you remember Detective Trotta of the Police Department? Well, he is here, and the FBI are here also. They think I robbed a bank this morning, but I told them I couldn't have robbed the bank because I was with you visiting this morning. The police will probably be down to see you soon."

America DeCastro, a nurse's assistant at St. Mary's Hospital, testified that she cared for Lord's mother on the morning of April 9, 1976. She said that she was in and around Mrs. Lord's room between 8:30 and 10:30 a.m. and did not see any visitors. (TT. 429-434; G. App. 196-201).

During the course of the FBI interview, Lord permitted the agents to examine the contents of his wallet. Despite the fact that Lord had not worked for many months, he had approximately $1,300.00 in his wallet. (TT. 384; G. App. 171). This was less than seven hours after the bank robbery.

Dennis Wakefield testified that in late March or early April, 1976 Schwartz visited his house with a man introduced to him as "Jimmy." At this visit Schwartz and Jimmy were dressed in coveralls, displayed a shotgun and bullets and told Wakefield that they were going to rob a bank, but the plan was postponed because of a supermarket robbery next door to the bank. (TT. 312-323). Wakefield positively identified Schwartz in court and said he "thought" the man introduced as Jimmy was James Lord, Jr. (TT. 313-319).

Gerhardt Schwartz, a member of the FBI's "Ten Most Wanted" List, was apprehended at 8:35 a.m. on November 22, 1976. After being advised of his Constitutional rights on at least two occasions, he executed a written waiver and agreed to be interviewed by the FBI at 11:00 a.m. Schwartz began to make his oral admissions at 11:40 a.m. following a half-hour conversation with his family. (G. App. 17). Schwartz's oral admissions were reduced to signed statements, wherein Schwartz:

1. Admitted that he, James Lord, and Ronald Hook robbed the Columbia Bank on April 9, 1976. He implicated Jerry Yagy as the one who provided the "wheel man." (G. App. 6). At the same time, Schwartz signed another statement admitting *only to his involvement* in the armed bank robbery and which did not mention or refer to any other person.

2. Admitted that he and Jerry Yagy had committed the armed robbery of the Wegman's supermarket around July 4, 1976 which netted $39,000.00. This robbery was never mentioned during the trial and Hook was specifically told not to bring it up in any way. (TT. 445; G. App. 7-8, 212). James Lord did not participate in this robbery.

3. Admitted that he and James Lord had repeatedly stabbed Ronald Hook with an icepick in order to keep him quiet about the Columbia Bank robbery. He advised that he heard of Hook's threat through Jerry Yagy. (G. App. 8-9).

During the trial only one of the six separate signed confessions of Schwartz was offered into evidence and received. Since that statement implicated Schwartz only, (G. App. 5), it did not even have to be redacted to remove references to any co-defendant. In fact, it was prepared with the specific knowledge that it might have to be used at a joint trial.

Ronald Hook positively identified Lord, Schwartz and Yagy as the persons who participated in the planning, execution and proceeds of the April 9, 1976 Armed Bank Robbery of Columbia Bank in Rochester, New York. (TT. 447, 457; G. App. 214, 224).

POINT I

Defendants' motion for a severance was properly denied.

The defendants Lord and Yagy each claim that they should have been granted a severance from Schwartz. The primary basis for this claim is that Schwartz had confessed to his involvement in the bank robbery. In addition, the defendants claim prejudice simply because they were involved in a joint trial with Schwartz.

The Government contends that the trial court's denial of a severance motion was well within the proper exercise of the court's discretion. In addition, the defendants' claims of prejudice are misleading, exaggerated and without foundation. Furthermore, their claims ignore the effect of the careful and complete cautionary instructions given to the jury.

The law is clear in this Circuit that a defendant must demonstrate substantial prejudice from a joint trial in order to gain a severance. It is equally clear that a trial court's decision

to deny severance will not be disturbed on review unless there is a showing of a clear abuse of discretion. *United States v. DeSapio*, 435 F.2d 272 (2d Cir. 1970); *United States v. Borelli*, 435 F.2d 500 (2d Cir. 1970); *United States v. Peden*, 472 F.2d 583 (2d Cir. 1973); *United States v. Adams*, 434 F.2d 756 (2d Cir. 1970); *United States v. Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 928; *United States v. Blitz*, 533 F.2d 1329 (2d Cir. 1976).

On December 7, 1976, Lord moved to sever his case from Schwartz and Yagy. (G. App. 28). The basis for this motion was that both Yagy and Schwartz had given full confessions implicating Lord which could not be reasonably redacted to delete the name of Lord. The trial court considered this motion on January 25, 1977. (G. App. 600-608). Since Yagy never gave any confession, no basis existed for severance of Lord and Yagy. Moreover, the confession of Schwartz only implicated Schwartz himself. (G. App. 5). Contrary to the allegations of Lord, the confession did not contain any "blanks" or substitute the word "another" for the name of Lord. In fact, the statement admitted before the jury is an "I only" statement which does not even indirectly infer that anyone else is involved in the robbery. This was so held by Judge Elfvin who denied the motion for severance. (G. App. 600).

On January 21, 1977 Yagy moved to sever his case from Schwartz and Lord. (G. App. 21).

The basis for this motion was that Lord and Schwartz had given full confessions implicating Yagy which could not be reasonably redacted to delete the reference to Yagy.[1] The trial

[1]Yagy made the additional argument that the severance should be granted because Lord and Schwartz have extensive criminal records. This defendant fails to show how this would affect or prejudice him in a joint trial. In fact, Yagy had a prior felony conviction as well. Regardless, the prior criminal convictions would not be admissible against the defendants themselves except in unusual situations, Cf. Rule 609, Fed.R.Ev.; *United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969). Nevertheless, the prior convictions of neither Lord, Schwartz nor Yagy were ever offered into evidence during the trial. None of the defendants testified during the trial.

court considered this motion on January 25, 1977. (G. App. 600-608). Since Lord never gave any confession, no basis existed for severance of Yagy from Lord. Moreover, since the statement of Schwartz only implicated Schwartz himself, there was no basis upon which to grant this motion. Judge Elfvin denied the motion for severance on January 25, 1977. (G. App. 600-608).

Here, all the defendants were involved in a common scheme, with a common series of transactions, and a continuity of purpose. Under the circumstances, a severance would have imposed a burdensome duplication of efforts without affording the defendants a commensurate advantage. The trial court's decision to deny a severance was a proper exercise of discretion.

Throughout the trial Judge Elfvin was very careful to caution the jury as to when and what testimony is admissible against which defendant. (See, eg. TT. 379, 445, 451, 455, 458, 461, 482, 487, 496, 909-10; See, also, TT. 168, 172, 694; G. App. 166, 212, 218, 222, 225, 228, 249, 254, 263, 549-50. The charge to the jury was specific on this requirement of compartmentalization. (TT. 909-910; G. App. 549-550). Furthermore, this Court has recently held that the "spill-over" effect is overcome easily where the trial judge specifically cautions the jury to compartmentalize the evidence against each defendant and the evidence, as here, uniquely lends itself to this compartmentalized consideration. *United States v. Toliver*, Docket No. 76-1130, Sept. 2, 1976 (2d Cir. 1976). It was obvious from the Schwartz confession itself that it concerned Schwartz alone. Moreover, the court gave specific limiting instructions in its charge. (TT. 910, 918-919, 932-933; G. App. 550, 558-59, 572-73). Further limiting instructions were given at the request of counsel for Lord (TT. 941; G. App. 581), and also at the request of counsel for Yagy. (TT. 940; G. App. 580).

To be excluded under *Bruton v. United States*, 391 U.S. 123 (1968) a confession must clearly inculpate a codefendant and be vitally important to the Government's case. In *United States v.*

Wingate, 520 F.2d 309 (2d Cir. 1975), the court held that under proper instructions a codefendant's statement which did not "name" the defendant was admissible, even where independent evidence in the case indicated that the unidentified person was the defendant. A factor considered by the court was the strength of the Government's independent evidence against the defendant. *See United States ex. rel. Joseph v. LaVallee*, 415 F.2d 150 (2d Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (harmless error where the case against the defendant was overwhelming); *Harrington v. California*, 395 U.S. 250 (1969); *United States v. Young*, 422 F.2d 302 (8th Cir.), *cert. denied*, 398 U.S. 914 (1970) (harmless error when the confession is merely duplicative and cumulative of written records and other evidence).

Bruton does not require exclusion of a confession if it does not inculpate a codefendant, *United States v. Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975); *Tasby v. United States*, 451 F.2d 394 (8th Cir. 1971), *cert. denied*, 406 U.S. 922 (1972); *United States v. Fountain*, 449 F.2d 629 (8th Cir. 1971), *cert. denied*, 405 U.S. 929 (1972); *Trigg v. United States*, 430 F.2d 372 (7th Cir.), *cert. denied*, 400 U.S. 966 (1970); *White v. United States*, 415 F.2d 292 (5th Cir. 1969), *cert. denied*, 397 U.S. 993 (1970).

Despite this, Appellant Lord claims that he was prejudiced by the confession because it violated the "spirit" of *Bruton*. Specifically, he claims prejudice because the confession corroborates the testimony of Hook.

The government submits that appellant has misplaced his reliance on *Bruton*. In that case, the confession was ruled to be a problem because 1) it denied the codefendants in the joint trial the opportunity to cross-examine the confessing declarant and, 2) there were not adequate precautions taken to eliminate mention, in the confession, of the codefendants on trial. In this case, the latter problem is not present because the confession is an "I only" confession. Although the defendants were not able

to cross-examine Schwartz, they suffered no prejudice because the confession was not admitted against them and did not even infer their involvement. However, the appellant Lord claims prejudice because the confession corroborated the testimony of Hook. In this regard, the appellant fails to recognize that he had ample opportunity to confront and cross-examine Hook, not only on what was said in court, but on the basis of numerous pretrial statements by Hook. In further support of this position, the appellant cites a portion of the prosecutor's summation (Lord: 22) as follows:

> "You have the confession of Schwartz, the confession telling his involvement in the bank robbery, the confession that I suggest to you coincides in numerous ways to *Ronald Hook's testimony regarding Mr. Schwartz' involvement in this bank robbery* . . . ." (TT. 835; G. App. 520). (Emphasis supplied.)

Appellant claims that this is an effort to reinforce Hook's testimony against all the defendants. This is clearly not so, as is shown by the above quote. However, to suggest that Mr. Lord suffered absolutely no prejudice by this situation would be impossible. Instead, the Government contends that he has not shown prejudice substantial enough to be reversible error. Instances occur in every joint trial where there is an overlap or "spill-over" to the codefendants. This does not require reversal unless there is shown substantial prejudice. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604 (1953); *cf.* Fed. R. Crim. P. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's cautionary instructions. *Bruton v. United States*, 391 U.S. 123 (1968).

In further support of this position, Appellant Lord contends that the judge should not have charged the jury regarding the use of Schwartz's statement as a basis for determining what Schwartz did on the date of the robbery. (Lord: 22-23). Although appellant concedes that it is a correct statement of the

law, he asserts that it is so complicated that the jury would not understand it. This argument is absurd as it would require the court not to charge the correct law on the subject. In addition, since the jury asked no questions to clarify this portion of the judge's charge, it would seem illogical to assume they did not understand it. Generally, the jury must be presumed to have followed the instructions of the trial judge. Cf. Bruton v. United States, 391 U.S. 123, 135 (1968).

Only the serious claims of prejudice have been discussed in this brief. Although the defendants claim additional prejudice, these claims are without foundation, misleading and exaggerated. They are discussed in summary as follows:

1. Incompetence of Schwartz' counsel had "spill-over" effect on Lord. (Lord: 24-28)

   — Schwartz doesn't even raise this issue in his appeal. Also, this claim is contrary to common sense and logic as the alleged errors claimed obviously only affected Schwartz.

2. Prosecution question on *voir dire* regarding the stabbing of Hook (Yagy: 18)

   — the Government submits this is a proper question in any trial where Hook is a witness. This question was mentioned once by the prosecutor (TT. 44; G. App. 81), and at least eleven times by Yagy's attorney. (TT. 112, 133, 136, 137, 145, 174, 193, 204, 221, 223). Furthermore, after extensive *voir dire* all the defendants each waived at least two of their six pre-emptory challenges. Surely this indicates that the jury was satisfactory.

3. Attempt at bank robbery the previous week (Yagy: 18)

   — this would certainly be admissible in a joint trial with Lord and Yagy. This defendant has failed to show a proper reason for severance from Schwartz. He surely cannot show that he should be severed from Lord.

4. Schwartz fleeing the community (Yagy: 19)

   — how this affects Yagy is impossible to imagine.

5. Lord's false exculpatory statements (Yagy: 19)

   — Yagy cannot establish a proper basis for severance from Lord. Furthermore, how this affects Yagy is impossible to imagine.

6. Lord's possession of money after the robbery (Yagy: 19)

   — how this affects Yagy is difficult to imagine.

7. Evidence of search of Schwartz' apartment

   — this had no effect on Yagy and there was no inference possible, drawn, sought or pursued by anyone in the trial.

The Appellants' arguments are no more than an assertion that Lord or Yagy may have had a better chance of acquittal were he tried separately. This alone is not the standard for severance in this Circuit. *United States v. Colabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

POINT II

The totality of the circumstances demonstrate that the appellant's confession was voluntary as required by Title 18, United States Code, §3501.

Pursuant to 18 U.S.C. §3501, Congress has provided that the admissibility of confessions in criminal prosecutions is to be governed by a judicial determination of "voluntariness". This statute is controlling in the present case. See *United States v. Marrero*, 450 F.2d 373, 378 (2d Cir. 1971). Voluntariness is determined in light of all of the circumstances surrounding the confession including:

A. *The Time Lapsing Between Arrest and Arraignment*

In addressing this issue, this Court stated in *United States v. Marrero*, 450 F.2d 373 (2d Cir. 1971):

> It is not the lapse of time but the use of the time when the commissioner or magistrate is unavailable, to employ the condemned psychologically coercive or third degree practices which is proscribed by the cases. *Marrero*, at 376.

The Court went on further to state that the rationale of the *McNabb-Mallory* cases proscribes not the mere lapse of time between arrest and arraignment, but its abuse by "pertinacious and harrassing interrogation." This same rationale is applied to 18 U.S.C. §3501.

Given these considerations, the absence of any showing, or even allegation, of coercion in the present case is significant. As the trial record shows, appellant Schwartz was arrested at 8:35 a.m. on November 22, 1976, in a Bronx apartment by agents of the Federal Bureau of Investigation (TT. 29; G.App. 65; See, also, *Interview Log* G.App. 14).

He was immediately advised of the charges against him, given his constitutional rights (TT. 67; G.App. 104), and was subsequently searched. At approximately 8:50 a.m. he was asked about a weapon and he indicated that there was a revolver in the closet. Schwartz was then given a cigarette and a coat. By 9:10 a.m. he was being driven to the F.B.I. office in New Rochelle, New York for processing.[3] (TT. 66; G. App. 103).

The appellant arrived at the F.B.I. office at 9:30 a.m. (TT. 33; G.App. 70). At 9:40 a.m. he was photographed and given another cigarette. By 9:55 a.m. the photographing was com-

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[2]In the present case, the magistrate was not available in New Rochelle. (TT. 683).

[3]Although a question has been raised as to why the appellant was not taken directly to the Manhattan F.B.I. office, it was determined at the pre-trial suppression hearing that the New Rochelle office was several miles closer to the place where the appellant was arrested. (TT. 102; G.App. 139). Furthermore, a trip into Manhattan would probably have involved greater traffic congestion and delay at this time of day.

pleted and the appellant was then strip searched.[4] (TT. 82; G.App. 119).

Upon completion of this routine processing, the appellant was presented with an Advice of Rights and waiver form which he read and signed at 10:04 a.m. (TT. 36; G.App. 73). At 10:10 a.m. he was fingerprinted and thereafter given coffee and allowed to smoke at will.

The appellant was interviewed for approximately thirty minutes and at 11:00 a.m. he requested permission to make a phone call. (TT. 39; G.App. 76). He called his wife. This conversation lasted for about thirty minutes, whereupon the interview resumed and at 11:40 a.m. the appellant began to give his oral statement. (TT. 39; G.App. 76).

There is no evidence of "pertinacious or harrassing interrogation" here. Furthermore, delay subsequent to the statement should not be counted in determining the length of time for purposes of evaluating voluntariness under Section 3501 (*United States v. Keeble*, 459 F.2d 757, 761 (8th Cir. 1972), *rev'd on other grounds* 412 U.S. 205 (1973) *Cf.*; *U.S. v. Leviton*, 193 F.2d 848 (2nd Cir. 1951)).

At approximately noon he was provided with lunch (TT. 75, 81; G.App. 112, 118) and by 12:30 p.m. the oral statement was completed. The statement was then typed (TT. 40; G.App. 77). The appellant read the statement, made one correction and signed it at 1:45 p.m. (TT. 41; G.App. 78).

At 2:00 p.m., the appellant left the New Rochelle Office and was transported to the F.B.I. office in Manhattan. (TT. 42; G.App. 79). Upon arriving at 2:35 p.m., the appellant was

[4] A strip search was a reasonable precautionary measure under the circumstances and not an unnecessary "indignity" as the appellant claims (Schwartz: 21). The appellant was listed as armed and dangerous and as one of the F.B.I.'s "Ten Most Wanted" (TT. 61; G. App. 98). Other than the fact that it occurred, the appellant does not claim impropriety in the manner in which it was conducted.

rephotographed because the camera had malfunctioned at the New Rochelle Office. By 2:50 p.m., the appellant was being transported to the Magistrate (S.D.N.Y.) (TT. 43; G.App. 80). About twenty minutes later he arrived at the United States Attorney's Office. An Assistant United States Attorney again advised him of the charges against him, told him his constitutional rights and interviewed him for approximately twenty-five minutes. The appellant was then transported to the U.S. Magistrate's Courtroom, interviewed by a public defender and arraigned at 4:37 p.m. (TT. 101; G.App. 138).

In light of this record the appellant urges that "the taking of his confession violated Rule 9(c)(1) of the Rules of Criminal Procedure and 18 U.S.C. §3500[5] as well as the Sixth Amendment". (Schwartz: 19).

We respectfully submit, however, that the trial record clearly indicates that the trial court did not err in failing to suppress the confession. The lapse of time which occurred between arrest and arraignment is but one factor to be considered regarding the voluntariness of the appellant's confession under §3501. See, *United States v. Collins*, 462 F.2d 792, 796 (2d Cir. 1972); *United States v. Marrero*, 450 F.2d 373, 378 (2nd Cir. 1971).

As in *Marrero*, Schwartz was given a full opportunity to contest the voluntariness of his statement at a pre-trial suppression hearing held on February 8, 1977.[6] At this hearing the appellant testified that his confession was given for the purpose

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[5]The appellant's reliance on 18 U.S.C. §3500 (which concerns production of Jenck's Act material by the Government) seems to be in error regarding this issue. Since 18 U.S.C. §3501 pertains to the admissibility of confessions, we will address the appellant's argument in terms of 18 U.S.C. §3501.

[6]However, unlike *Marrero*, Schwartz's statement was not made to an Assistant United States Attorney. The problem raised by pre-confession detours through the office of an Assistant United States Attorney (See *U.S. v. Marrero*, 450 F.2d 373, 379 (Friendly, J. concurring)) is not presented here since Schwartz's confession was obtained long before this interview.

of bringing himself under Rule 20, Fed. R. Crim. Proc., and thereby keeping his proceeding in the Southern District of New York instead of Rochester, New York (TT. 119; G.App. 143). He then stated that it was his plan to testify at trial and claim that the statements were false. (TT. 120; G.App. 144). However, this testimony was contradicted by the testimony of Special Agent Richard K. Berry. He stated that the only conversation concerning Rule 20 took place *subsequent* to the confessions and after he had been advised of his rights and waived them. (TT. 38; G.App. 75). Agent Berry's testimony was corroborated by Special Agent Hutton who also testified at this hearing. (TT. 81-103; G.App. 118-140).

The trial court (Elfvin, J.) found Schwartz's claims to be "incredible" (TT. 136; G.App. 157) and the confession was ruled admissible. (TT. 139; G.App. 160).

Before this hearing ended, however, a matter concerning the issue of "unnecessary delay" between the arrest and arraignment of Schwartz was collaterally raised by counsel for Yagy. In addressing this issue, the trial court reviewed the events surrounding the confession and found nothing to require exclusion of the confession. (TT. 135; G.App. 156).

The propriety of this ruling is well-supported by the circumstances of the case as well as by the law. The time elapsing between the appellant's arrest and his confession is approximately three hours and most of this time was consumed in processing and transporting the appellant. As to any post-confession delay, the courts have found that it is not pertinent in making the statutory determination of voluntariness. *United States v. Keeble*, 459 F.2d 757, 761 (8th Cir. 1972) *rev'd on other grounds*, 412 U.S. 205 (1973); *Cf. United States v. Mitchell*, 322 U.S. 65, 69-71, (1944); *United States v. Leviton*, 193 F.2d 846, 853 (2d Cir. 1951) *cert. denied*, 343 U.S. 946 (1953) (prestatute cases holding that the critical period is the time between the arrest and statement and any illegal detention

after the statement has been made will not affect its admissibility).

The precise question as to what constitutes "unnecessary delay"[7] must be determined by the trial judge, *Watson v. United States*, 234 F.2d 42 (D.C. Cir. 1956) who must take into consideration all the facts and circumstances of the case. *Muschette v. United States*, 322 F.2d 989 (D.C. Cir. 1963), *vacated on other grounds*, 378 U.S. 569 (1964). *See also*, Advisory Committee Note to Fed. R. Crim. P. 5(a).

It is generally recognized that delay for the purpose of accomplishing "the ordinary administrative steps required to bring a suspect before the nearest magistrate" is permissible. *Mallory v. United States*, 354 U.S. 449, 453 (1957). In applying this standard, this Court has held that "routine processing", *United States v. Collins*, 462 F.2d 792, 795 (2d Cir.) *cert. denied*, 409 U.S. 988 (1972), "overnight lodging", *United States v. Middleton*, 344 F.2d 78, 82 (2d Cir. 1965), a reasonable period of time for transportation of the suspect to the magistrate, *United States v. Marrero*, 450 F.2d 373, 377-78 (2nd Cir. 1971), See also, 18 U.S.C. §3501(c) and delay in order to reduce a defendant's statement to writing, *United States v. Curry*, 358 F.2d 904, 913 (2nd Cir. 1965) *cert. denied*, 385 U.S. 873 (1966) do not constitute unnecessary delay.

When viewed in light of these decisions and this Court's interpretation of Section 3501 (which is that no legitimate delay beyond six hours *per se* precludes admissibility) *United States v.*

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[7]Although the appellant relies on Rule 9(c)(1), we submit that both Rule 9(c)(1) and Rule 5(a) of the Federal Rules of Criminal Procedure equally protect a defendant's Sixth Amendment right to counsel by providing that arrested individuals are to be brought before a federal magistrate "promptly" and "without unnecessary delay". While the precise language of these rules differs, these standards are substantially indistinguishable. Since we do not have much case law interpreting 9(c)(1), we feel that reliance on the interpretations of 5(a), where there is a wealth of judicial construction, is not misplaced.

Ortega, 471 F.2d 1350, 1362 (2nd Cir. 1972); *cert. denied*, 411 U.S. 498 (1973); *United States v. Marrero*, 450 F.2d 373, 379 (2nd Cir. 1971), the appellant's claim that he was denied his right to counsel because of a lapse of time between arrest and arraignment simply lacks merit.

B. *The Appellant Knew the Nature of the Offense With Which He was Charged.*

The appellant was informed of the charges against him on several occasions: When he was arrested in his apartment, (G. App. 14), and when he was interviewed by the F.B.I., (G. App. 4). There can be no doubt that he knew the nature of the offense with which he was charged. *See United States v. Diggs*, 497 F.2d 391, 393 (2d Cir.) *cert. denied*, 419 U.S. 861 (1974).

C. *The Appellant Was Advised That He Had the Right to Remain Silent and That Any Statement He Made Could Be Used Against Him.*

Schwartz was immediately advised of his constitutional right to remain silent when he was arrested by the F.B.I. on the morning of November 22, 1976 and he subsequently waived that right. *See United States v. Barone*, 467 F.2d 247, 249 (2d Cir. 1972). The validity of that waiver is not raised in this appeal and we find no circumstances which indicate that it was not an effective and knowing waiver.

D. *The Appellant Was Advised Prior to Questioning of His Right to the Assistance of Counsel.*

On each occasion that the appellant was informed of his right to remain silent, he was also advised of his right to the assistance of a lawyer and that if he could not afford a lawyer, one would be appointed for him. (G. App. 4, 14).

E. *The Presence of Counsel When The Confession Was Made.*

While the government concedes that the appellant's Sixth Amendment right to the assistance of counsel had attached, *See, Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the facts and circumstances surrounding his confession clearly demonstrate that it was given voluntarily and that he intentionally waived, abandoned and relinquished his right to counsel prior to making his statement. This defendant was no stranger to the criminal process. *Cf. United States* v. *Diggs*, 497 F.2d 391, 393 n.2 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974) (where defendant had been arrested some 21 times before). In addition, the Court found that he was in full control of his faculties. (TT. 134, 135; G. App. 155, 156).

The proper standard to be used in determining a valid waiver is whether a defendant has made "an intentional relinquishment or abandonment of a known right or privilege." *Brewer v. Williams*, U.S.L.W. 4287, 4292 (March 22, 1977) citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). While the court in *Brewer* found that no waiver was made, its decision rested on several factors which distinguish that case from the instant one. In *Brewer*, the defendant's "consistent reliance upon the advice of counsel in dealing with the authorities," i.e. contact with attorneys before turning himself in, after being booked and after arraignment "refuted any suggestion that he waived his right to counsel." *Brewer* at 4292. Furthermore, the defendant's "statements while in the car that he would tell the whole story *after* seeing his attorney in Des Moines were the clearest expressions that he desired the presence of an attorney before any interrogation took place." *Brewer* at 4292.

In considering these factors, it is obvious that the circumstances surrounding appellant Schwartz's confession provide no indicia that he desired the presence of counsel.

The fact that the appellant has been arrested on numerous prior occasions, that he was quite familiar with criminal procedures, and the nature of his constitutional rights cannot be ignored. Moreover, unlike in *United States v. Satterfield*, Slip Op. 805, 807 (2nd Cir. December 7, 1976), Schwartz does not paint "a picture of an individual distraught, upset, weeping and obviously out of control" at his questioning. In fact, the trial judge observed this fact on the record. (TT. 134, 135).

To the contrary, the record clearly demonstrates that at least prior to the statement, the appellant was not submitted to unnecessary delay, nor was he abused by a coercive interrogation. Indicative of the absence of any "third-degree practices" is the fact that he was given an opportunity to speak with his wife for thirty minutes. This conversation certainly gave him comfort, and certainly demonstrates that he was not held "incommunicado" in order to intensify pertinacious or abusive interrogation.

In light of these facts and circumstances, the government respectfully submits that the appellant's statements were voluntary for the purpose of the Fifth Amendment (an issue not raised here) and were voluntary with "regard . . . [to] the higher standard with respect to a waiver of the right to counsel that applies when the Sixth Amendment has attached," *United States v. Satterfield*, Slip Op. 805, 808 (2d Cir. 1976) quoting Judge Friendly dissenting in *United States v. Massimo*, 432 F.2d 324, 327 (2nd Cir. 1970) *cert. denied*, 400 U.S. 1022 (1971). The government has met the heavy burden of showing that Schwartz had "knowingly and intelligently" waived his Sixth Amendment rights. *Faretta v. California*, 422 U.S. 806, 835 (1973) quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

After reviewing the claims of error, this Court should weigh them considering the other evidence in the case. Here, the

testimony of unindicted co-conspirator Ronald Hook establishes, by itself, the guilt of Schwartz beyond a reasonable doubt. This testimony, despite repeated cross-examination, was unassailed. In addition, the testimony of Dennis Wakefield certainly was positive as to the identification of Schwartz, his possession of a sawed-off shotgun and his claim of attempted robbery the week before the robbery in this case. These items taken together are conclusive as to the guilt of Schwartz.

Therefore, assuming *arguendo* that the appellant's confession was improperly admitted, we respectfully submit that it was nevertheless harmless error when weighed against the other evidence presented at trial. As such, a reversal of this defendant's conviction would not be reasonable.

POINT III

The defendants were not denied due process by reason of the failure of the FBI to preserve its rough notes following the preparation of the formal 302 summary.

The appellants claim a violation of due process by reason that the FBI, in good faith and in accord with normal practice, destroyed its notes after preparation of the Form 302 summary. There is no allegation that the notes were destroyed for improper purposes. Instead, they claim that the production of these notes would have been extremely useful.

The appellant contends that since the agent who took the notes was not available, there is some infirmity with the procedure. The Government submits that this agent's testimony would have been cumulative since the other agents who did testify were present with Schwartz the complete time. (TT. 23-61, 666-692; G. App. 60-98, 428-458). As appellants admit, Schwartz does not contest the substance of the confessions which he signed (Schwartz: 25), but only the question of whether there were any promises regarding Rule 20. Since Agents Hutton and Berry explained this conversation and were

present during the whole period, it is not likely that the notes would have ever been useful to the defendant.

While appellants can establish the theoretical purpose for such use, they are unable to demonstrate that he would have any success in that aim.

The Courts in the Ninth Circuit and the District of Columbia Circuit have specifically held that the rough notes of investigators taken during an interview of a principal witness should be retained for possible production at the discretion of the trial judge. *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975).

There is no such definitive holding in the Second Circuit. Instead, this Circuit has held that the mere fact of destruction with no intent to suppress evidence does not require striking the witness' testimony or granting a new trial. *United States v. Covello*, 410 F.2d 536 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States v. Jones*, 360 F.2d 92 (2nd Cir.) *cert. denied*, 385 U.S. 1012 (1967); *United States v. Greco*, 298 F.2d 247 (2nd Cir.) *cert. denied*, 369 U.S. 820 (1962); *United States v. Crosby*, 294 F.2d 928 (2nd Cir. 1961) *cert. denied*, 368 U.S. 984 (1962); *United States v. Thomas*, 282 F.2d 191 (2nd Cir. 1960). In *Killian v. United States*, 368 U.S. 231 (1961), the Supreme Court, in remanding the case for a hearing in the district court, stated that a new trial would not result if information from agents' notes were transferred to other reports and the notes were then destroyed in good faith and in accord with normal practice. See also, *United States v. Terrell*, 474 F.2d 872 (2nd Cir. 1973).

Most recently, the Second Circuit has reaffirmed its position on this issue. In *United States v. Anzalone and Vivelo*, (Docket Nos. 76-1458, 76-1461 May 6, 1977) this Court declined to follow *United States v. Harrison*, and adhered to the view expressed in *United States v. Terrell*, 474 F.2d 872 (2nd Cir. 1973). In *Terrell*, the Court said:

> This court has several times held in varying contexts that the Jencks Act, 18 U.S.C. §3500, imposes no duty on the part of law enforcement officers to retain rough notes when their contents are incorporated into official records and they destroy the notes in good faith. *E.g. United States v. Covello*, 410 F.2d 536, 545 (2d Cir. 1968), *cert. denied*, 396 U.S. 879 (1969) (good faith destruction does not require new trial); *United States v. Jones*, 360 F.2d 92, 95 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967) (good faith destruction does not require striking agent's testimony). Here there was no suggestion or showing as in *United States v. Lonardo*, 350 F.2d 523 (6th Cir. 1965), that the notes were deliberately destroyed on the eve of trial and were substantially different in content from the formal report.

There is no claim of impropriety here. There is no claim that Schwartz did not say what is contained in the confessions (Schwartz: 25).

In view of the above, there can be no valid claim that the defendants were denied due process by the failure to retain the rough notes. The trial court declined to strike the testimony on this issue.

Furthermore, if error is present, and the government does not concede that there is error, it is harmless in view of the substantial evidence against these defendants.

POINT IV

The sentence of each defendant was a proper exercise of the discretion of the sentencing judge.

The Appellants Lord and Yagy argue that their sentences were excessive and thereby amount to cruel and unusual punishment.[8] Since the maximum sentence possible for Lord on

[8]Appellant Yagy also claims that the judge should not have sentenced him consecutively on the charge of bank robbery and conspiracy. He supports this claim by contending that aiding and abetting is the same as conspiracy to commit a bank robbery. This contention is discussed in Point V of the Government's brief.

the charges of armed bank robbery and conspiracy was thirty years, the sentence of twenty-five years is well within the sentencing prerogative of the judge. Since the maximum sentence possible for Yagy on the charge of bank robbery and conspiracy is twenty-five years, the sentence of fifteen years is well within the sentencing prerogative of the judge. Both sentences were within the statutory limit established by Congress.

It has been uniformly held that the imposition of sentence is within the discretion of the sentencing court, if the sentence is within the statutory limit. *United States v. Tucker*, 404 U.S. 443 (1972).

In *United States v. Velazquez*, 482 F.2d 139 (2d Cir. 1973) at 142, the Court of Appeals noted:

> We are bound by prior case law to the rule that, absent reliance on improper consideration, see *United States v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman J. Concurring), or materially incorrect information, see *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), a sentence within the statutory limits is not reviewable.

The same principle was enunciated in *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). In *United States v. McCord*, 466 F.2d 17, 18-19 (2d Cir. 1972) the court noted "that a sentence within the statutory limits is generally not subject to review," quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972).

In *Tucker*, it was also pointed out that the trial court may exercise wide discretion in the imposition of sentence, and that the trial judge is "largely unlimited as to the kind of information he may consider, or the source from which it may come." *Id.*, 404 U.S. at 447.

In the case at hand the trial judge neither abused his discretion in the imposition of sentence, nor based the deter-

mination of which sentence to impose on misinformation. There is no claim of impropriety in the sentencing of these defendants.

Instead, the defendants have claimed either a vast difference in this sentence as compared to that given a codefendant or as compared to other defendants convicted of similar offenses in other cases. There is no record before this court upon which the Government can base its argument against this claim. Surely it would be an impossible task for the Government to justify every variance in sentence given by a particular court involving similar crimes.

The appellants' arguments should be summarily rejected by this Court.

POINT V

The Trial Court did not err in sentencing Yagy to consecutive terms for conspiracy and aiding and abetting.

The appellant Yagy contends that the crime of conspiracy to commit a bank robbery and aiding and abetting the commission of a bank robbery are the same crimes and therefore preclude the imposition of a separate sentence for each crime.

The Government contends that the cases cited by the appellant are inapposite. The appellant has misplaced his reliance on cases which do not consider the same situation as this case.

The rule is generally settled that a defendant does not receive multiple punishment, in violation of the double jeopardy prohibition, when he is convicted and sentenced for a substantive offense and also for a conspiracy to commit the same offense. *United States v. Rabinowich*, 238 U.S. 78 (1915); *Pereira v. United States*, 347 U.S. 1 (1954); *Pinkerton v. United States*, 328 U.S. 640 (1946). In such situations the courts have consistently held that there are two offenses, and hence no Fifth Amendment violation, if conviction of one offense requires proof of a fact not required for conviction of the other. *Blockburger v. United States*, 284 U.S. 299 (1932).

The Second Circuit has disposed of appellants' issue in *United States v. Crosby*, 314 F.2d 654 (2d Cir. 1963). In that case the Court said:

> It is elementary that, with limited exceptions not here relevant, separate sentences may be imposed for violating a criminal statute and for conspiring to violate it. *Pinkerton v. United States*, 328 U.S. 640, 642-644 (1946). Indeed, this may be done even when the sole evidence of commission of the substantive offense is participation in the conspiracy, which makes the defendant an aider or abettor of the substantive crime. *Pinkerton v. United States, supra*, at 645-648.
>
> It is of no consequence that the proof of the substantive violation of the statute may have disclosed an agreement to perform the violation in concert; what is critical for the permissibility of separate sentences for substantive offenses and for conspiracy is that the former "do not require more than one person for their commission." *Pereira v. United States*, 347 U.S. 1, 11 (1954).

Furthermore, the Supreme Court faced a similar argument in *Pereira v. United States*, 347 U.S. 1 (1953) and specifically rejected the appellant's contention here. In *Pereira*, the defendants were charged with the substantive offense of mail fraud and conspiracy to commit that same offense. The defendant Pereira was the principal actor in the substantive charges and the defendant Brading was convicted of these charges under the "aiding and abetting" statute. Both defendants were convicted on the conspiracy and both appealed. In responding the Court stated:

> The petitioners allege that their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy. It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. *See, Pinkerton v. United States*, 328 U.S. 640, 643-644,

> and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. *Cf. Gavieres v. United States*, 220 U.S. 338. The substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. Pereira's conviction on the substantive counts does not depend on any agreement, he being the principal actor. Similarly, Brading's conviction does not turn on the agreement. Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. *Nye & Nissen v. United States, supra*, at 620. Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses — proof of an agreement to commit an offense against the United States — and it cannot be said that the substantive offenses and the conspiracy are identical, any more than that the two substantive offenses are identical.

Appellant Yagy's argument in this regard is incorrect and should be summarily rejected by this Court.

POINT VI

The defendant Yagy was not denied his right to a speedy trial.

POINT I of Yagy's brief alleges a denial of speedy trial rights. This is typical of his shotgun approach to this appeal. The allegations here are not only unsupported by case law, but also ignore clear and definite precedent to the contrary. Furthermore, Yagy has misstated some basic facts, and has totally ignored other very relevant facts. This claim is totally frivolous.

This defendant was arrested on July 26, 1976 and the trial was held on February 8, 1977 to February 12, 1977. The period of time from the date of arrest to trial is 197 days. Pertinent dates and facts are as follows:

Date	Action	Explanation
7/26/76	Arrest of Yagy	Yagy surrendered himself to the FBI on this date. His arrest was pursuant to a warrant issued on July 20, 1976. He was arraigned before a magistrate on July 26.
7/29/76	Indictment Filed	In compliance with 18 U.S.C. §3161(b) & (f) Yagy was indicted within 45 days of arrest (D.App. H)
7/30/76	Yagy Arraigned	In compliance with 18 U.S.C. §3161(c) Yagy was arraigned within 10 days of indictment.
8/1/76 to 8/31/76	District Court in Summer Recess	
9/13/76	Yagy's Motion for Discovery and Inspection; to Dismiss because of improper Grand Jury testimony; and to Dismiss for failure of the indictment to state facts sufficient to constitute an offense against the United States.	This 34-page motion requested information not discoverable and demanded dismissal on clearly improper grounds. Although dated September 1, it was not mailed to the Government until September 7, (G.App. 21) Paragraph 6 swears that Yagy was confined to a hospital at this time. In addition, Yagy had no objection to the motion being adjourned to September 27, 1976, the next motion date in Rochester. (G.App. 584)
9/16/76 11/8/76	Judge Burke hospitalized and convalescing	No cases were heard in Rochester during this period although the Government made efforts to bring this case to trial.

Date	Action	Explanation
9/21/76	Letter from Colicchio	In this letter the attorney admits to an opportunity to have these motions argued promptly in Buffalo. Instead, the defendant chose to have the matters adjourned to November 8, 1976.
10/1/76	Government filed Notice of Readiness	
10/4/76	Government's Motion to Assign Judge	Due to the continued illness of Judge Burke the Government moved to have a new judge assigned to hear this case. The motion disclosed a caseload of 43 cases which had to be tried promptly (D.App. H).
10/12/76	Yagy's Response to Motion to Assign Judge	In this affidavit, Yagy's attorney admits to having a conference with Government attorney regarding discovery. However, Yagy insists on having motions heard and determined and also opportunity to bring new motions. Paragraph 5 states that Yagy is to undergo surgery on October 8, 1976 and will be "indisposed" for a period of four (4) weeks. Paragraph 6 states that Yagy is *not* ready for trial and will *not* be ready for some time. Paragraph 7 suggests that other cases be tried first. (G.App. 586-88).
10/13/76	Trial Date Opportunity	By letter September 24, 1976 to Judge Van Graafeiland, Yagy says he is not ready for trial. The second paragraph of that letter indicated that the delay from September 27 to November 8, 1976 was opted for by the defendant. (G.App. 589). See also letter from Colicchio on September 29, 1976.

Date	Action	Explanation
10/25/76	Motion Argued	Judge Elfvin agreed to handle this case in Judge Burke's absence. This was the argument of the Defendant's motions. The Government agreed to provide a written response but did not do so until Dec. 7, 1976. Yagy not ready as he has to return to the hospital. (G.App. 592-93).
11/17/76	Letter from Lord's Attorney	A letter here from Lord's appointed attorney says he is not ready for trial (G.App. 595). Delay here would be excludable under 18 U.S.C. §3161 (h)(7)
11/22/76	Co-defendant Schwartz was arrested in New York City to be returned to Rochester for joint trial.	
12/7/76	Government filed its response to Defendant's motions	
12/13/77	Trial Date Opportunity	By letter dated December 7, 1976, Yagy says he can't go to trial. Although the Government's response was filed the same day, Yagy's attorney advised he will be out of the state December 22 to January 10, 1977. (G.App. 596)
1/19/77	Letter from Colicchio	In this letter, the defendant responds to Government's answer forwarded to him on December 7, 1976. This is a delay of almost 6 weeks. It was occasioned by the defendant. Yagy to make motion for severance. (G.App. 598)
1/25/77	Yagy files motion for a severance	See Court Docket
1/25/77	Trial Date Opportunity	

Date	Action	Explanation
1/25/77	Yagy requests a continuance to February 8, 1977. Granted with specific waiver by Yagy to delay from 1/25/77 to 2/8/77.	This portion of the transcript of 1/25/77 shows the waiver by Yagy. (G.App. 600)
2/8/77	Motion to Dismiss for Speedy Trial	This motion was denied by Judge Elfvin. (G.App. 609, 612).
2/8/77	Trial begins	

The Government answers the defendant's claims as follows:

1. ***The Government has complied with the Speedy Trial Act.***

The various provisions of the Speedy Trial Act dictate specific limits within which the defendant must be tried. The substance of 18 U.S.C. §3161(g) provides that this defendant must be tried within 180 days from his arrest. However, 18 U.S.C. §3161(h) provides for specific periods to be excluded from this period for purposes of this act.

In this case the trial commenced 197 days after the arrest of Yagy. The periods of exclusion in this case are numerous. They are as follows:

Total time 197 days
less excludable time
as follows:

Justification	Dates		
§3161(h)(7)	1/25/76 to 2/8/77	15 days	
§3161(h)(1)(G)	10/25/76 to 11/23/76	30 days	
§3161(h)(3)	10/7/76 to 11/3/76	27 days	72 days
			125 days

These excludable periods appear on the Court's docket (D.App. I). However, the Government submits that there are numerous other periods of excludable time (e.g. 9/27/76 to

11/8/76 where Yagy opts to adjourn rather than argue motion in Buffalo; consideration of numerous motions by this defendant; general unavailability of the defendant's attorney; institutional delay of Judge Burke's illness). However, this claim is so frivolous that to deal with it in further detail would be unnecessary.

2. ***Rule 48(b) Federal Rules of Criminal Procedure***

Rule 48(b) of the Federal Rules of Criminal Procedure was designed to implement the right to a speedy trial. The rule is a mere restatement of the "inherent power of the court to dismiss a case for want of prosecution." Committee Note to Rule 48, 8A Moore's Federal Practice, §48.01.

Rule 48(b) is merely a skeleton which the Speedy Trial rules "flesh out" giving content to its sweeping language "by substituting a precise, albeit still flexible, six month rule." *Hilbert v. Dooling*, 476 F.2d 355, 361 (2nd Cir. 1973).

Since Mr. Yagy was afforded his right to a speedy trial under the Speedy Trial Act, it follows that he received the right to a speedy trial guaranteed by Rule 48(b).

3. *Sixth Amendment*

In *Barker v. Wingo*, 407 U.S. 514 (1971), the Supreme Court set out the criteria by which the Sixth Amendment right to a speedy trial is to be judged. Specifically, the Court mentioned four major factors:

a. *Length of Delay*

Here the length of delay was barely six months. No court has ever held that this short a period of time is *per se* excessive. In fact, the courts have held far more lengthy periods to be permissible. See: *Barker v. Wingo*, 407 U.S. 574 (1971) (65 months); *U.S. v. Saglimbene*, 471 F.2d 16 (2nd Cir. 1972) *cert. denied*, 411 U.S. 966 (1973) (6 years); *U.S. v. Fassanaro*, 471 F.2d 717 (2nd Cir. 1973) (4 years).

b) *Reason for Delay*

The Court can attribute numerous reasons for delay to the defendant only. In addition, institutional delays accounted for substantial periods. Although the Government's response to the defendant's motion for discovery was not filed promptly, this period is not significant if consideration is given to the unavailability of Judge Burke from 9/16/76 to 11/8/76 and the fact that Schwartz was just apprehended on November 22, 1976.

c) *Defendant's Assertion of His Rights*

The defendant did not request a speedy trial until February 8, 1977. This was the very day the trial was commenced. Furthermore, the defendant indicated repeatedly throughout the period that he was unavailable for trial. In fact, three trial date opportunities were declined by this defendant.

d) *Prejudice to the Defendant*

The defendant has not shown any relevant prejudice as a result of the delay. In essence, he claims that if he were tried earlier, without Schwartz, it would have been better for him. However, the circumstances of this case made that earlier date impossible due primarily to institutional delays. In addition the defendant himself had an operation on October 7, 1976 and was to be incapacitated at least four weeks. This appellant does not even allege, much less demonstrate, that he suffered any of the actual prejudice contemplated by the Court in *Barker v. Wingo*.

It is submitted that under any test, the Government did virtually everything it should have done to bring this case to trial. Furthermore, this defendant brought a similar motion to dismiss on the speedy trial issue on February 8, 1977. This motion was denied by Judge Elfvin. (G. App. 612).

It is submitted that this Court should not overrule this decision unless it is shown that Judge Elfvin was "clearly

erroneous". *Cf. U.S. v. Maxwell*, 484 F.2d 1350 (5th Cir. 1973); *U.S. v. Gavic*, 520 F.2d 1346 (8th Cir. 1975), *U.S. v. Leonard*, 525 F.2d 1076 (2nd Cir. 1975).

POINT VII

The Trial Court did not err in refusing to voir dire the jury with respect to prejudicial publicity and possible misconduct.

The appellants claim that the trial court committed reversible error in failing to *voir dire* the jury with respect to prejudicial publicity (Schwartz: 16-18; Lord: 31-32) and possible taint to a juror (Lord: 32-33).

The Government contends that the court properly exercised its discretion in refusing to *voir dire* the jury. Such a matter is entirely up to the discretion of the trial judge who was fully aware of the atmosphere of the trial, the nature of the inquiry, the probable effect of such an inquiry on the jury, the necessity for such an inquiry as well as the effect of any delays caused by such an inquiry. Clearly the trial court did not err in denying the suggestion to *voir dire* the jury.

After jury selection, the trial judge specifically instructed the jury not to read or in any way be influenced by anything in the media (TT. 210-211; G. App. 56-57). In addition, the court further cautioned:

> If you find that you are unduly influenced by it [exposure to the media] you can tell me tomorrow morning or some day whenever it happens. We want to keep you from the outside factors and have you concentrate on the evidence in the case. You have none of that at this point. You will get it all in the courtroom and no place else. (VT. 211; G. App. 57).

This admonition was also brought to the attention of the alternate jurors (VT. 225; G. App. 58), one of whom later served on the trial jury itself. The instruction to ignore outside

influences was repeated several times during trial. (See. *e.g.* TT. 773-774; G. App. 461-62).

It is submitted that the Court was fully aware that any *voir dire* at that time would serve no purpose but to cause the jury to speculate as to precisely the things about which it should have no concern. In fact the court expressly stated this in its ruling. (TT. 534-535; G. App. 300-301). Moreover, it is significant that appellants do not allege or show any inaccuracies in the newspaper articles. What was reported was exactly what happened in front of the jury.

It is clear that there is no Constitutional right to *voir dire* the jury regarding prejudicial publicity. *CF. U.S. ex. rel. Stickler v. Tehan*, 365 F.2d 199 (6th Cir. 1966). Such a decision rests totally within the wide discretion of the trial judge. *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969).

The appellant further contends that the trial court should have *voir dired* the jury regarding possible contamination by an Assistant Public Defender. In denying this request, the Court suggested that the contamination influence would be "remote" (TT. 787; G. App. 472). Certainly, in view of the fact that the Public Defender was a trial lawyer with specific ties to representing defendants it is remote that he did anything to harm any defendant. In addition, in view of the court's instruction to the jury to report to him anytime anyone tries to influence them (TT. 352; VT. 211; G. App. 57) it is not likely that any attempt was made, especially by a Public Defender.

Whether to conduct a *voir dire* is well within the discretion of the trial judge. *United States v. Jordano*, 521 F.2d 695 (2d Cir. 1975); *United States v. Ploof*, 464 F.2d 116 (2d Cir. 1972) *cert. denied*, 409 U.S. 952 (1972); *United States v. Tramunti*, 513 F.2d 1087 (2d Cir. 1975). In view of the court's careful instructions to the jury, it cannot be said that he abused that discretion.

POINT VIII

No substantial prejudice resulted from references to the stabbing incident.

Each of the appellants claim substantial prejudice by reason of the question in *voir dire* relating to the stabbing of Ronald Hook.

The Government contends that the question was properly raised in good faith, carefully phrased and did more to assure the possibility of a fair trial than to cause prejudice.

As is clear from the government's offer of proof and the trial court's ruling regarding the admissibility of the stabbing testimony (TT. 497; G. App. 264), the prosecutor had good reason to believe that it was a matter for the jury's consideration. This position is substantially reinforced by the confession of Schwartz in which he admits to stabbing Hook with an ice-pick because of the bank robbery. (G. App. 8).

Furthermore, the question was carefully phrased so as not to implicate any of these defendants. Since the question immediately jogged the memories of the jurors (VT. 44; G. App. 41), there was substantial benefit from the question. Imagine, for example, if while Hook was testifying, a juror remembered the incident. If the juror was thereby prejudiced by this recollection, the defendants may never know or be able to correct the situation. Instead, the jurors who recalled the incident were struck by the defendants, and the remainder were thoroughly examined to insure their fairness and lack of prejudice. In fact, although the Government only mentioned this incident once (VT. 44; G. App. 41), the defense attorneys brought it up a dozen times. (VT. 98, 112, 133, 136, 137, 145, 174, 193, 204, 221, 223).

The defense selected a very fair and very impartial jury because they were able to eliminate all those who expressed any hesitation regarding the stabbing. So thorough was the

examination, and so satisfied were each of the defense attorneys, that Lord waived two preemptory challenges and Schwartz and Yagy each waived three such challenges. If this jury was so prejudiced by this statement certainly the attorneys would have had more challenges for cause, and would certainly never have waived the right to exercise so many preemptory challenges.

The appellants claim the prejudice from the stabbing incident was substantial. They allege that it was before the jury "throughout the trial." This is not true. The stabbing was first raised in a carefully phrased question in *voir dire*. Thereafter, the stabbing incident was never before the jury at any point during the trial. In fact, the court specifically ruled out all evidence of the stabbing prior to the time it was testified to in front of the jury. (TT. 542; G. App. 308).

Since the jury was completely satisfactory to each of the defendants following the *voir dire*, and since no further mention of the stabbing was before the jury, it is difficult to see the justification of their claim of substantial prejudice.

Appellant Yagy also alleges prosecutorial misconduct in that the prosecutor used the phrase "scars for life" (Yagy: 20) in his summation. Contrary to what Yagy claims, no objection was made at trial to the use of the word "scars".

The Government contends that there was no prosecutorial misconduct. The unfortunate use of the word "scars", in context, certainly did not, and was not intended to, refer to the stabbing. The fact that there was no objection at the time indicates that in the context it was used, it had no impact. Instead, Yagy asserts general claims of impropriety and, without citation to the record, claims this was "vigorously objected" to by the defense. That is not so. In fact, the prosecutor did not use the phrase quoted by appellant Yagy. This portion of the prosecutor's closing is as follows:

> We know that Lord and Yagy are in the car, they are going over the bank robbery, and then there's the conversation the next day where Mr. Yagy alone is saying, 'Don't worry about it, it will be easy, and you will never get caught, and even if you do get caught they are not going to do anything to you,' and perhaps that is right as it turns out, because he is a seventeen year old boy, and that is a very interesting situation, but what is the Government giving up in giving this boy another shot, another chance at life, and think of the scars of his experience, participating in a bank robbery, think of that, and having to testify and be subjected to cross examination, think of how he will remember that, if that won't help him in the future. . . . (TT. 826; G. App. 511).

Certainly, in context, this use of the word "scars" cannot be considered prosecutorial misconduct.

Furthermore, since no objection was made at trial, this court would apply the "plain error" doctrine of Rule 52, Federal Rules of Criminal Procedure. As such, the appellate court would only reverse for errors that are "obvious" and "substantial". *U.S. v. Jackson*, 542 F.2d 403 (7th Cir. 1976). Here, this was only a passing reference intended to refer only to the emotional scars of the bank robbery, the trial and the cross-examination. No prejudice was intended and none resulted.

Moreover, since the proof against these defendants was clear and convincing, only minimal, if any, prejudice could have resulted to the defendants. *U.S. v. White*, 486 F.2d 204 (2d Cir. 1973).

POINT IX

The Trial Court made a proper finding that there was a satisfactory showing of the existence of a conspiracy to admit statements of coconspirators against a non-present coconspirator.

The Appellant Yagy has again presented a frivolous issue on this appeal. He complains in Point VI of his brief that:

> The trial court's dialogue before the jury that, in the Court's opinion, prima facie showing of conspiracy had been established and that if the jury so found a conspiracy involving the four defendants that said verdict would be sustained, is extremely prejudicial, plain error, and a violation of defendant Yagy's Sixth Amendment rights (Yagy: 33).

In fact, the trial court never mentioned the phrase "prima facie" in this connection. Instead, the appellant chooses to ignore this obvious fact and engages in a misleading examination of the case.

As is shown by the record, the statement by the trial judge was made in response to an objection by Yagy's attorney (TT. 461; G.App. 228). Since this ruling was different from the previous rulings given in this area the judge explained his ruling. This was certainly proper.

The trial judge did not commit error in making a determination of conspiracy for evidentiary purposes. Rather, he acted in accordance with the requirements of the Federal Rules of Evidence and Second Circuit case law.

Rule 104, Federal Rules of Evidence, leaves to the trial judge the question of admissibility. As such, the trial judge must consider whether the prosecution has proved participation in conspiracy, by the defendant against whom the hearsay is offered, by a "fair preponderance of the evidence," independent of the hearsay utterances. *United States v. Stanchich*, 550 F.2d

1294 (2d Cir. 1977); *United States v. Geany*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub. nom. Lynch v. United States*, 397 U.S. 1028 (1970).

When Judge Elfvin ruled that there was a "satisfactory showing" (TT. 461-463; G.App. 228-30), on the issue of conspiracy to merit introduction of hearsay, there is no doubt but that he was applying the appropriate Second Circuit test. A federal trial judge is presumed "to have and exercise trial skill of the highest order and to exercise a wise and just discretion." *Scott v. United States*, 263 F.2d 398, 401 (5th Cir. 1959). There is no evidence that Judge Elfvin used less than the "preponderance" standard.

In addition, it was clear that he did not take the ultimate question from the jury. In fact, he stated that specifically at the time (TT. 461-463; G.App. 228-30). Furthermore, the judge specifically charged this issue to the jury at the close of proof (TT. 899; G.App. 539). Following the judge's charge, Appellant Yagy registered no exception to this statement of law to the jury (TT. 940; G.App. 580). He now claims prejudice on this appeal.

On the issue of whether there is a satisfactory showing of conspiracy, the test in the Second Circuit is that the judge must determine, when all the evidence is in, whether the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of independent evidence. *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977).

A fair reading of the previous testimony of Ronald Hook on this issue would show that the trial judge had made a proper determination (TT. 407 *et. seq*; G.App. 174 *et. seq.*). Having exercised this discretion, the trial court's decision should not be reversed on appeal unless there was a clear abuse of his discretion. That, of course, has not been alleged or established by the appellant.

POINT X

Evidence of Yagy's gambling partnership with Hook was entirely relevant and admissible evidence.

Appellant Yagy contends that evidence of the gambling partnership with Hook was entirely irrelevant and prejudicial because it involved criminal conduct and, therefore, should not have been admitted into evidence (Yagy: 22-23).

The Government contends that at no time was the gambling ever characterized as "criminal" or "illegal." Since not all gambling is illegal, there is no common sense basis for Yagy to conclude that this evidence referred to "criminal conduct." Furthermore, at no time during Hook's testimony regarding the gambling *prior* to the bank robbery did Yagy ever register an objection (TT. 419-449; G.App. 186-216). As to the testimony after the bank robbery, the prosecutor requested several times that he be allowed to make an offer of proof (TT. 490, 493, 496; G.App. 257, 260, 263). Thereafter the offer of proof was made and arguments heard thereon (TT. 497-519; G.App. 264-286). However, the Court gave the jury the specific instructions that the "gambling" testimony is stricken from the record and the jury was to ignore it (TT. 520, 547, 743; G.App. 287, 313, 459).

Whether evidence is relevant is to be decided by the trial judge. Rule 401, Federal Rules of Evidence defines relevant evidence as any evidence that makes an "action more probable or less probable than it would be without the evidence." Hook's statements about Yagy's gambling are relevant in light of that definition. Hook's testimony that he and Yagy owed a significant sum of money ($900.00) because of the gambling partnership establishes the motive for the bank robbery. *Cf.* Rule 404(b), Fed. R.Ev., *United States v. Johnson*, 525 F.2d 999 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1127. Since Yagy failed to object to this testimony, its significance as an issue on appeal is materially reduced. Fed. R. Crim. P. 52(a). It can hardly be considered "plain error."

Regarding the testimony of the gambling after the robbery, the Government contends that the trial court's ruling and specific instruction to the jury was sufficient to remove any threat of substantial prejudice. The error, if any, was harmless because of the court's prompt instruction to the jury (TT. 520; G.App. 287). Furthermore, the defendant Yagy did not register any objection to the court's instruction on this issue (TT. 520-521; G.App. 287-88). As such, the error, if any, would have to be "plain error" for this court to consider it on appeal. *Cf.* Fed. R. Crim. P. 52. This can hardly be called "plain error".

Moreover, even if, with the clarity of hindsight, Hook's testimony were considered to be irrelevant, this determination is left to the discretion of the trial judge. *United States v. Catalano*, 491 F.2d 268 (2d Cir. 1974), *cert. denied*, 95 S.Ct. 42. Unless the trial court has abused its discretion, its findings will not be overturned. *United States v. Calles*, 482 F.2d 1155 (5th Cir. 1973). No abuse of discretion occurred in this case.

POINT XI

The evidence at trial was substantial and was fully sufficient for the jury to find Yagy guilty of the crimes charged.

The appellant Yagy argues that the evidence submitted by the Government was insufficient to find the defendant guilty. The appellant ignores the complete testimony of Ronald Hook, who positively identifies Yagy as being the one who established the motive; recruited Hook to drive the getaway car; conspired with Lord to establish the route to be followed; and shared handsomely in the proceeds (TT. 407-666; G.App. 174-432).

In effect, Appellant argues that as a matter of law the court should have granted his motion for judgment of acquittal on the ground that the Government failed to establish its case for a violation of Title 18, United States Code, §§371 and 2113(a).

Such a contention betrays a misunderstanding of both the evidence in this case and the function of the court and jury in a criminal trial.

It is settled, of course, that this Court, in reviewing the denial of such a motion, must examine the evidence in the light most favorable to the Government and must determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, making full allowance for the jury to assess the credibility of the witnesses, weigh the evidence and draw justifiable inferences from it. *United States v. Barash*, 412 F.2d 26 (2d Cir. 196[illegible] *cert. denied*, 90 S.Ct. 86; *United States v. Aiken*, 373 F.2d 294 (2d Cir. 1967); *Crawford v. United States*, 375 F.2d 332 (D.C. Cir. 1967); *United States v. Wilson*, 342 F.2d 43 (2d Cir. 1965); *United States v. DeSisto*, 329 F.2d 929 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964).

In this case, the evidence, particularly when viewed in the light most favorable to the Government, presents an overwhelming case that the appellant is guilty beyond a reasonable doubt. Although the evidence against Yagy is primarily based upon the complete testimony of Ronald Hook (TT. 407-666; G.App. 174-432), that does not present any infirmity in the Government's case. Despite the fact that Ronald Hook is an accomplice, if believed by the jury, his testimony would be sufficient to support the conviction. *See, Caminetti v. United States*, 242 U.S. 470 (1917); *United States v. Caci*, 401 F.2d 664 (2d Cir. 1968); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

While the appellant clearly disagrees with the jury verdict, it can hardly be seriously argued that there was no evidence upon which the jury could rely to support its verdict.

POINT XII

The Trial Court's charge on the issue of identification was more than satisfactory.

The Appellant Lord claims that the trial court erred in failing to give the identification charge he requested (TT. 944).

In stating this claim, the appellant totally ignores the fact that the trial court gave a lengthy instruction on the identity issue (TT. 923-925; G.App. 563-65). In addition, he fails to even mention where this charge is defective in any respect. Furthermore, since the matter of an additional identification instruction is largely discretionary, it would seem that appellant should recognize the futility of this claim. *United States v. Sambrano*, 505 F.2d 284 (9th Cir. 1974).

This claim should be summarily rejected by this Court.

POINT XIII

The admission into evidence of false exculpatory statements of Lord was appropriate.

Appellant Lord raises the impropriety of the prosecution's use of his false exculpatory statements. While asserting that the use of such statements is prejudicial, it is notable that the defendant cites no authority for his contention.

Rather, weighty case law in the Second Circuit establishes the principle that false exculpatory statements "are circumstantial evidence of guilty consciousness and have independent probative force." *United States v. Smolin*, 182 F.2d 782, 786 (2d Cir. 1950). *See United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974) *cert. denied*, 419 U.S. 1105 (1975); *United States v. Lacey*, 459 F.2d 86 (2d Cir. 1972); *United States v. DeAlesandro*, 361 F.2d 694 (2d Cir.) *cert. denied*, 385 U.S. 842 (1966); *United States v. Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959), *cert. denied* 351 U.S. 961 (1960); *United States v.*

Bando, 244 F.2d 833, 842 (2d Cir.), *cer denied* 355 U.S. 844 (1957).

This claim should be summarily rejected by this court.

POINT XIV

On the basis of the complete record the defendants were given a fair trial.

Each of the appellants claim that because of various incidents which occurred throughout the testimony of Ronald Hook, the trial court should have granted a mistrial.

The Government contends that a fair reading of the trial transcript would reveal that the prosecutor proceeded with great caution and in good faith. Moreover, the trial judge scrupulously protected the rights of these defendants in a very long and difficult trial. The Government has included the complete transcript of the testimony of Ronald Hook, including discussions and arguments out of the presence of the jury, in the Appellee's Appendix for review by this Court. (G. App. 174-432).

While certainly there were unfortunate moments in this trial that did occur, the vigilant supervision by the trial judge eliminated or reduced such incidents to harmless error. The cautionary instructions by the trial court were very proper. It is not unreasonable to assume that in these cases the jury can and will follow the Court's instructions. *Cf. Bruton v. United States*, 391 U.S. 123 (1968). Furthermore, viewing the trial as a whole would convince this Court that the claims of "substantial prejudice" by the appellants is not supported by the record. The defendants are entitled to a fair trial, not a "perfect" one. *Lutwak v. United States*, 344 U.S. 604 (1952).

POINT XV

The defendants were given a full and fair trial.

The evidence taken as a whole was properly admitted and substantial enough for this court to affirm the convictions. Despite the presence of some error, this was certainly harmless given the weight of the evidence and the thoughtful management of the trial by a capable trial judge.

CONCLUSION

This conviction should be affirmed in all respects.

Respectfully submitted,

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Affidavit of Service

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(1)

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